No. 96-1925

In The Supreme Court of the United States

October Term, 1996

Caterpillar Inc.,
Petitioner,

v.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its affiliated Local Union 786,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

Harold P. Coxson
Ogletree, Deakins, Nash, Smoak & Stewart
2400 N Street, N.W.
Fifth Floor
Washington, D.C. 20037
(202) 887-0855
Counsel for the Council on Labor Law Equality, Amicus Curiae

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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QUESTION PRESENTED

Whether Section 302(c)(1) of the LMRA exempts employer payments of wages and benefits to full-time union officials from the otherwise criminal proscriptions of Section 302(a) because those payments are negotiated during collective bargaining and are "by reason of" the union officials' past service with the employer?

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BRIEF AMICUS CURIAE OF THE COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

COLLE is a national association of employers formed in 1981 to provide legal support to the business community through the filing of *amicus curiae* briefs with the courts and the National Labor Relations Board on those issues arising under the federal labor statutes which affect a broad cross-section of industry.* COLLE was formed to

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* This brief is being submitted by the Council on Labor Law Equality ("COLLE"), as amicus curiae in support of petitioner. The parties have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae COLLE certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity other than COLLE and their counsel made any monetary contribution to the preparation or submission of this brief.

create a specialized and continuing business community resource to maintain a balanced approach in the formulation and interpretation of national labor policy. Over the years, COLLE has participated as an *amicus curiae* in cases of major significance before the National Labor Relations Board and the federal courts, including the Supreme Court. *See, e.g., International Bhd. of Elec. Workers v. Colorado-Ute Elec. Ass'n, Inc.*, No. 91-1284 (1992); *Lechmere, Inc. v. NLRB*, No. 90-970 (1992); *Building & Constr. Trades Council v. Altemose Constr. Co.*, No. 85-82 (1986); *NLRB v. Transportation Management Corp.*, No. 82-168 (1983).

This case involves employer payments to full-time union representatives pursuant to Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186. The resolution of the issues raised in this case is significant for COLLE, its member, Caterpillar Inc., as well as its other member companies, because the Third Circuit *en banc* fashioned an overly permissive interpretation of Section 302 that permits employer payments to full-time union officials "by reason of" the union officials' past service with the employer and because those payments were negotiated in collective bargaining. *Caterpillar Inc. v. United Auto Workers of Am.*, 107 F.3d 1052 (3d Cir. 1997). None of the other Courts of Appeals that has interpreted the Section 302(c)(1) exemption—including the Second, Fifth, Sixth, Seventh, and Eleventh Circuits—has expanded the exemption to this extent.

An equally important concern is that under Section 302(d) of the LMRA, 29 U.S.C. § 186(d), violation of Section 302(a) subjects employers to criminal penalties. *Cf., United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (imposing criminal penalties against union officials for violating Section 302(a)), *cert. denied*, 115 S. Ct. 1312 (1995); *Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) ("The proper remedy for the situation if bribery was indeed involved is prosecution of the company and union officials at fault, not judicial approval of the

bribery scheme"), *cert. denied*, 493 U.S. 994 (1989). In light of the vastly different interpretations that the courts have given to the Section 302(c)(1) exception, employers have no uniform federal guidance regarding their potential criminal exposure.

It is COLLE's position that an employer's payment of wages to full-time union officials who perform no work for the employer is contrary to the plain language of Section 302(a). Because Caterpillar's payments were not generally applicable to former employees "as compensation for, or by reason of" their past service with the employer, these payments could not have been saved from illegality under the Section 302(c)(1) exemption. In addition, regardless of a union's strength during collective bargaining, activity that is unlawful cannot be legitimized simply because an employer "agreed" to it in negotiations.

ARGUMENT

Fifty years ago, Congress passed the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 151-87, heralding in a new era of labor management relations. In addition to setting forth the rights of unions, employers, and employees, the law also delineated the boundaries of lawful and unlawful payment arrangements between employers and unions in Section 302 of the Act. 29 U.S.C. § 186.

Section 302 arose out of legislative concern that employer payments for pension and welfare benefits often were diverted to the benefit and personal use of union leaders or as resources to be used during a strike. Congress enacted Section 302 as part of a comprehensive reform of federal labor law and policy, to deal specifically with practices inimical to the integrity of collective bargaining, and to prevent practices which, if unchecked, could lead to bribery and extortion by union officials or which, by collusion, might impair the impartiality of employee representation. *Arroyo v. United States*, 359 U.S. 419, 424-25 (1959). Congress therefore made it unlawful, except in very narrow circumstances, for employers to pay money or any other thing of value to union officials:

> It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce; . . . .

29 U.S.C. § 186. Based simply on a plain reading of Section 302(a), all employer payments to union officials are unlawful.

Section 302(c), however, contains several exceptions to the prohibitions found under Section 302(a). The exception at issue in this case is found in Section 302(c)(1). In relevant part, it provides that it is not unlawful for an employer to pay money or other thing of value to any representative of his employees who is a present or former employee "as compensation for, or by reason of, his service as an employee of such employer[.]" 29 U.S.C. § 186(c)(1). Section 302(c)(1) does not contain an exception that permits employers to use the collective bargaining process to make payments that would not otherwise be permitted under Section 302. It is for Congress, not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947); *Caterpillar v. United Auto. Workers of Am.*, 107 F.3d 1052, 1058 (3d Cir. 1997) (dissent).

For decades, unions have tested the boundaries of the criminal statute by seeking to negotiate various payment arrangements, which employers have challenged in the courts. In general, the courts have upheld payment arrangements where employees take a few hours out of the workday or workweek to perform work for the union.

These agreements are known as "no-docking" arrangements and they are not being chailenged here.[1]

The courts have rejected arrangements, however, where:

- payments are made to individuals who are not employed by the employer, *see e.g., Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981) (because industry steward could not be characterized as an employee of Bechtel, any contributions by Bechtel to the industry steward fund would violate the terms of Section 302(a));
- payments were not compensation for or by reason of the employees' service to the employer, *see, e.g., Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986) (ruling unlawful union's attempt to have employer make contributions to pension trust funds on behalf of employees who took leaves of absence to accept full-time positions with the union or its parent international because contributions were not made for past service to the employer);

---

[1] As the Third Circuit observed, "no-docking arrangements have been consistently upheld by the courts as not in violation of § 302 because the employer's payment is to current employees as compensation for, or by reason of, their service to the employer." *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854-56 (5th Cir. 1986); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); *Herron v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), *aff'g & adopting dist. ct. analysis*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers v. Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416, 423-24 (D.D.C. 1987); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458, 461 (N.D. Ill. 1970). Such practices are also permitted under Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) ("*Provided*, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay") and Section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth ("*Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time. . . .").

- the union sought retroactive pension service credit for former employees on leave working full time for the union; *see, e.g., Toth v. USX Corporation*, 883 F.2d 1297 (7th Cir.) (Section 302(c)(1) does not exempt an employer's leave of absence policy awarding retroactive pension service credit to former employees who were on leave working full-time as union officials because payments are not made for past services rendered by the former employee while an employee), *cert. denied*, 493 U.S. 994 (1989); and,
- the employer agreed to extend its leave of absence policy to enable union leaders to obtain company provided pensions even though they had been working full time for years as a union official, *see, e.g., United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994) (affirming imposition of criminal penalties against union officials who obtained in collective bargaining retroactive extensions of their leave of absence from the employer so as to qualify them for employer-provided pensions, even though they had not worked for the employer for many years), *cert. denied*, 115 S. Ct. 1312 (1995).

In each of these cases, the union's arrangement fell outside the Section 302(c)(1) exemption.

In the present litigation, the UAW, during collective bargaining, sought to have Caterpillar pay the wages and fringe benefits of full-time union officials who performed *no* services at all for Caterpillar. The union officials were on leave of absence and would be paid at the same rate as when they last worked on the factory floor. *Caterpillar*, 107 F.3d at 1053. They conducted business from the union hall, performed no duties directly for Caterpillar, and were not under the control of Caterpillar except for time reporting services. *Id.* The Union contended that because the employees on leave for union business worked for Caterpillar in the past, the payments satisfied the exception under Section 302(c)(1) for payments made "by reason of" the employees' past service to Caterpillar. This exception for past service has come to be known as the

"by reason of" exception to Section 302. The Third Circuit overruled its prior precedent in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986), and became the first court to hold that Section 302(a) was not violated by an agreement that placed full-time union officials in a *paid* leave of absence status. In addition, the Third Circuit found significant the fact that Caterpillar and the union agreed to this arrangement as part of the collective bargaining process.

COLLE supports the petition for certiorari in this case for several reasons. First, its employer members suffer potential exposure to criminal penalties for violations of Section 302(a). Second, the collective bargaining process will be facilitated by Supreme Court guidance clearly defining the scope of the Section 302(c)(1) exemption. Third, the lack of uniformity among the circuits regarding what types of payments from employers to union officials are lawful under Section 302 of the LMRA and what the proper test should be for interpreting the Section 302(c)(1) exemption cause significant uncertainties for employers with multi-state collective bargaining agreements. The same collective bargaining provision may be lawful in one jurisdiction and unlawful in another.

I. LEGISLATIVE HISTORY MAKES CLEAR THAT IT IS UNLAWFUL FOR AN EMPLOYER TO PAY FULL-TIME UNION OFFICIALS WHO PERFORM NO WORK FOR THE EMPLOYER, REGARDLESS OF WHETHER THE ARRANGEMENT IS NEGOTIATED IN COLLECTIVE BARGAINING

Section 302 is a conflict-of-interest statute that was designed to eliminate practices that have the potential for corrupting the labor movement. *Caterpillar Inc. v. United Auto. Workers of Am.*, 107 F.3d at 1057 (majority opinion) and 1059 (dissent); *see United States v. Phillips*, 19 F.3d at 1574. As reflected in the legislative history, Section 302 was introduced on the floor of the Senate as a proposed amendment to S. 1126, 80th Cong., 1st Sess.

(1947), a bill to amend the NLRA as originally enacted in 1935. The proposed amendment (i.e., Section 302) read, in pertinent part, as follows:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> (c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; . . . .

93 Cong. Rec. 4704 (1947). The remainder of subsection (c) listed additional not currently relevant categories of exemptions. In introducing this proposed amendment, Senator Ball, one of its authors, stated that one of Section 302's purposes was to ensure that payments by employers to the unions would not "degenerate into bribes." 93 Cong. Rec. 4805 (1947). Other senators echoed this understanding. *See, e.g., id.* (statement of Senator Byrd); *id.* at 4877 (statement of Senator Taft). *See also Arroyo v. United States,* 359 U.S. 419, 425-26 (1959) (remarking that "corruption of collective bargaining through bribery of employee representatives by employers, . . . extortion by employee representatives, and . . . possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control" were the congressional concerns that led to the enactment of Section 302) (footnotes omitted).

It is quite clear from the legislative history that Congress understood that even negotiated payments from em-

ployers might "degenerate into bribes." *See* 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor-Management Relations Act, 1947, at 1305 (1948), (discussing welfare funds). *See also United States v. Phillips*, 19 F.3d 1595 (11th Cir. 1994) (upholding criminal convictions of union officials who negotiated unlawful employer payments in the form of retroactive pension credit), *cert. denied*, 115 S. Ct. 1312 (1995); *Caterpillar*, 107 F.3d at 1060 ("Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management") (dissent).

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401-531, which amended several sections of the LMRA, including Section 302. Congress intended to broaden the categories of persons affiliated with unions to whom the proscriptions of Section 302 would apply, *see* H.R. Rep. No. 741, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2424, 2469, and to make it applicable "to all forms of extortion and bribery in labor-management relations some of which may slip through the present law." S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2329. Indeed, the Conference Report noted that no person in a position of trust should "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," and that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31 (quoting ethical practices code of American Federation of Labor and Congress of Industrial Organization). "The Government which vests in labor unions the power to act as exclusive bargaining representative must make sure that the power is used for the benefit of workers and not for personal profit." *Id.* at 2331.

In sum, there is nothing in the legislative history to suggest that Congress believed that the process of collective bargaining could "save" otherwise potential illegal or unlawful conduct under Section 302. To the contrary, Congress intended to prohibit *any* payment, including payments negotiated by the employees' exclusive bargaining representative, unless it fell within the Section 302(c) exception. The payments that the UAW negotiated in collective bargaining with Caterpillar—payments to full-time union officials who are not working for Caterpillar—violate Section 302(a) and contravene the expressed intent of the legislation's drafters. Caterpillar's payments to full-time union officials would place such persons in a position in which their self-interest may "conflict with complete loyalty to those whom they serve," and cause responsible trade union officials to "have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." Thus, unless section 302(c)(1) applies, the sought-after payments violate Section 302(a).

II. THE THIRD CIRCUIT'S DECISION HAS EXPANDED THE SECTION 302(c)(1) EXCEPTION SO THAT IT EFFECTIVELY SWALLOWS THE PROSCRIPTIONS IN SECTION 302(a)

The Third Circuit did not find that the payments were exempted under a plain reading of Section 302(c)(1) or its legislative history. Rather, the Third Circuit interpreted the "by reason of" exception in Section 302(c)(1) to apply to the payments solely because they were negotiated in collective bargaining:

> We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself.

Caterpillar, 107 F.3d at 1056. By extending the exception to payments made to grievance representatives who take "years, even decades, of paid union leave," and perform *no* work for the employer, simply because those payments are bargained for, the Third Circuit has so far broadened the scope of the exception that it has swallowed the prohibitions in Section 302(a).

None of the other courts of appeals to consider the scope of Section 302(c)(1) has applied the exception to payments not directly connected with the individual's past service for the employer. Neither have they rationalized such payments because the payments were "negotiated" in collective bargaining. *See, e.g., Toth*, 883 F.2d at 1305 ("at some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302(a)—if, for example, the terms of compensation for former employment were clearly so incommensurate with that former employment as not to qualify as payments 'in compensation for or by reason of' that employment, or if the terms vested so much discretion in the employer that the potential for undue influence created a clear section 302(a) violation"); *IBEW Local 2514 v. National Fuel Distribution Corp.*, 16 Emp. Ben. Cases (BNA) 2018 (W.D.N.Y. 1993).

Rather, the "by reason of" exception of Section 302(c)(1) has consistently been interpreted to encompass payments for past service that are not properly classified as "compensation." *Caterpillar*, 107 F.3d at 1058 (Mansmann, J., dissenting) (collecting cases). The federal courts have applied the "by reason of" exception to pensions, 401(k) plans, life and health insurance, sick pay, vacation pay, jury and military leave pay, and other fringe benefits to which all employees may be entitled "by reason of" their service. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) ("by reason of" exception applies to fringe benefits "such as vacation pay, sick pay and pension benefits"), *cert. denied*, 115 S. Ct.

1312 (1995); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986) ("by reason of" payments include "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits and the like"); *see also Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.) (severance pay and payments to disabled employees are "by reason of" former employment), *cert. denied*, 493 U.S. 994 (1989).

Without the "by reason of" exception for past service, these payments would be illegal if paid to any employee or former employee who worked full-time for a union because they could not be considered "compensation" from the employer. This exception in its traditional application serves a salutary purposes. Labor managment relations in the workplace would be imperiled if employees who were given time off with pay to process grievances would lose the right to these benefits simply because they worked part-time, or took short periods of leave under the employer's policy to serve as a union official. As the dissent in *Caterpillar* recognized, "[s]ection 302(c)(1) plainly exists to enable company employees to obtain what is rightfully theirs. In other words, the section 302(c)(1) exception does not entitle union representatives to receive payments *because of* their service to the union; the exception allows union representatives to receive payments *in spite of* their current service for the union." *Caterpillar*, 107 F.3d at 1059 (Mansmann, dissenting).

Until the Third Circuit's decision, the linchpin between lawful conduct and employer payments has always been that the employee must receive the compensation or other payments because of his or her service for the employer. *Caterpillar*, 107 F.3d at 1059, citing *Phillips*, 19 F.3d at 1575 ("by reason of" payments "from an employer to a union official must relate to services actually rendered by the employee"), *id.* (under plain meaning of exception, "payment given to *former* employee must be for services

he rendered *while he was an employee*"); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1049 ("by reason of" payments are those "occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work") and at 1050 ("The exception permits only compensation for or by reason of 'service as an employee'; a union official who, though on the employer's payroll, performed no service as an employee, would not be within § 302(c)(1)'s exception"); *Reinforcing Iron Workers Local Union No. 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981) (under "literal construction" of section 302, payment to industry steward who performs services for the union, not employer, are unlawful).

After the Third Circuit's decision, there is no legal distinction between the arrangement in *Caterpillar* and an arrangement in which an employer agrees to pay the salaries and fringe benefits for full time union officers or agents who have not worked actively for five, ten, or fifteen years. For example, the Third Circuit's interpretation may give unions—on threat of strike or other economic pressure, or as a negotiated trade-off for other terms and conditions in the collective bargaining agreement—the power to demand employer payments to full-time union offiicals so long as those officials worked for the employer at some point in time. According to the Third Circuit, as long as the payment is "by reason of" the official's past service for the employer and the employees agreed to it in collective bargaining, it is lawful under Section 302(a). That interpretation is not supported by the legislative history, the plain reading of the statute, or any of the cases previously decided in the other circuits. Further, that interpretation invites the abuse of the collective bargaining process which Congress sought to address through Section 302 and which would be inimical to fundamental principles of labor law and policy.

In effect, the Third Circuit's interpretation legitimizes virtually any type of payment from the employer to a union official so long as the payment is negotiated and ratified in a collective bargaining agreement. That interpretation would so eviscerate Section 302 as to render it a nullity, once again leaving the collective bargaining process ripe for abuse.

III. LABOR AND MANAGEMENT REQUIRE UNIFORM FEDERAL GUIDANCE TO INTERPRET SECTION 302(c)(1) IN LIGHT OF THE CHANGED LEGAL LANDSCAPE IN THE WORKPLACE

When Section 302 was first passed in 1947, the employment landscape was vastly different. Aside from jointly-trusteed welfare funds established pursuant to Section 302(c)(5), 29 U.S.C. § 186(c)(5), there was no such thing as an ERISA-covered pension plan, employee welfare benefit plan, vacation plan, 401(k) plan, and the like. Health care coverage was not portable. *See* The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, Aug. 21, 1996, 110 Stat. 1936. There was no Family Medical Leave Act that required employers to grant unpaid leave without any disruption to the employee's entitlement to benefits. *See* 29 U.S.C. § 2601-54, These workplace benefits now exist. If employees who temporarily leave the employer's workplace for reasons other than union business do not lose their right to accrue credit towards these various benefits, employees who take leaves of similar duration to serve as union officials should not lose their benefits either.

However, once the union "negotiates" for exceptions that apply *only* to union officials—expanding a leave of absence policy only for union officials, or procuring retroactive pension credit solely for union officials—the union engages in the types of conduct prohibited by Section 302(a). The "potential" for conflicts of interest arises, and the officials' duty of loyalty is compromised. If the

Third Circuit's "full-time union office" exception is accepted, it would provide fertile ground for corruption by permitting union officials who perform no work for the employer to negotiate special wages and benefits applicable to themselves alone on the basis that they once worked for the employer. Whether the bargaining unit employees "ratify" the illegal payment that their negotiators have procured is irrelevant under the plain language of the statute, its legislative history, and the judicial precedent of other circuits. To compensate such individuals who perform no current work for their employer is clearly not what Congress intended to privilege when it enacted the Section 302(c)(1) exception.

The Third Circuit's decision is fundamentally inconsistent with every other court of appeals which has considered the Section 302(c)(1) exception. To provide uniformity and prevent abuse of the collective bargaining process, and for the reason that the Act's criminal proscriptions attach to employers as well as unions, COLLE urges the Court to consider this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD P. COXSON
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
2400 N Street, N.W.
Fifth Floor
Washington, D.C. 20037
(202) 887-0855
Counsel for the Council on Labor Law Equality, Amicus Curiae